

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	I.D. No. 0808009337
v.	:	
	:	
ANTHONY D. PRICE,	:	
	:	
Defendant.	:	

Submitted: January 30, 2009

Decided: February 4, 2009

**ORDER**

Defendant's Motion to Dismiss.

*Denied.*

Kathleen A. Dickerson, Esquire of Department of Justice, Dover, Delaware; attorneys for the State of Delaware.

Adam D. Windett, Esquire of Law Office of Charles E. Whitehurst, Jr., LLC, Dover, Delaware; attorneys for the Defendant.

WITHAM, R.J.

## **BACKGROUND**

On August 4, 2008, shots were fired into a crowd at New Castle Avenue and River Road in Dover, Delaware, striking Tonya M. Harris in the lower back. Immediately after the incident, bystanders identified Anthony D. Price (“Defendant”) as one of the shooters.<sup>1</sup> Defendant remained in the area of the incident and cooperated with police officers performing the investigation. Defendant was transported to the Dover Police Department, denied involvement in the shooting, and submitted to a Gun Shot Residue test (“GSR test”). After further investigation, on August 8, 2008, Defendant was arrested and charged with one count of Assault in the First Degree, seven counts of Possession of a Firearm During the Commission of a Felony, six counts of Reckless Endangering in the First Degree, Possession of a Firearm by a Delinquent, and Conspiracy in the Second Degree.

The State sent a letter to Defendant’s counsel on January 5, 2009, informing him that the GSR test had been improperly administered. The letter states that the applicator was not applied to Defendant’s hands, and therefore, the GSR kit could not be sent for analysis. At oral argument, the State indicated that the applicator was, in fact, applied to Defendant’s hands, but the applicator was not first moistened with

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<sup>1</sup> Defendant alleged in his Motion to Dismiss that no witnesses identified Defendant as a shooter. At oral argument on January 30, 2009, the State provided a copy of the police report that included the following: “multiple bystanders pointed out a black male suspect wearing all black with red rimmed sunglasses, who they observed shooting in the area of New Castle Ave. and River Rd.” Defendant’s counsel conceded that witnesses identified Defendant at the scene, and that he misread the police report as reading “multiple bystanders pointed out a black male suspect . . . who they observed *standing* in the area of New Castle Ave. and River Rd.”

nitric acid solution, which rendered the GSR kit untestable.

On January 16, 2009, Defendant filed a Motion to Dismiss, arguing that the State breached its duty to preserve the GSR evidence as a result of gross negligence, and that the only appropriate remedy is dismissal of the action. The State did not respond to Defendant's motion.<sup>2</sup> Oral arguments were heard on January 30, 2009.

### **DISCUSSION**

When the State has failed to preserve evidence that could be favorable to the defendant, the Court follows the three-step analysis set forth in *DeBerry v. State*.<sup>3</sup> "The same analysis is applicable when the claim is made that the government had a duty to preserve the material by *gathering* it and failed to do so."<sup>4</sup> The *DeBerry* analysis balances the nature of the State's conduct against the prejudice to the defendant.<sup>5</sup> "The State must justify the conduct of the police or prosecutor, and the defendant must show how his defense was impaired by the loss of the evidence."<sup>6</sup>

The first step in this *DeBerry* analysis is to determine whether the material on

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<sup>2</sup> The State failed to reply to Defendant's motion in writing, despite this matter having been continued from January 23, 2009. Given the significance of the issue, the State should have filed a written response.

<sup>3</sup> 457 A.2d 744 (Del. 1983).

<sup>4</sup> *Bailey v. State*, 521 A.2 1069, 1090 (Del. 1987) (emphasis in original). In this case, the State failed to properly gather and preserve the material on Defendant's hands, and a *DeBerry* analysis is appropriate.

<sup>5</sup> *Hammond v. State*, 569 A.2d 81, 87

<sup>6</sup> *DeBerry*, 457 A.2d at 752.

Defendant's hands, which was improperly gathered and preserved for GSR testing, would have been subject to disclosure under Superior Court Criminal Rule 16 or *Brady*.<sup>7</sup> "[U]nder Superior Court Criminal Rule 16(b), a defendant need only show that an item 'may be material to the preparation of his defense' to be discoverable."<sup>8</sup> The results of the GSR test, or in the alternative, the material collected from Defendant's hands for GSR testing, could be crucial to the preparation of the defense of a person, such as Defendant, charged with firing a gun. Therefore, the Court finds that if the GSR test results or the material collected from Defendant's hands was in the State's possession, it would have been discoverable under Rule 16.

The second step in the *DeBerry* analysis requires the Court to examine the State's duty to preserve discoverable evidence.<sup>9</sup> The Delaware Supreme Court has declined to prescribe exact procedures for law enforcement agencies to follow in order to fulfill their duty to preserve evidence.<sup>10</sup> However, the Court held that agencies "should create rules for gathering and preserving evidence that are broad enough to include any material that could be favorable to a defendant."<sup>11</sup>

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<sup>7</sup> *Id.* at 750. The Court in *DeBerry* noted that determining whether the missing evidence would be discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963) would be an artificial exercise, since the evidence was no longer available for testing. *Id.* at 751 n.5. Therefore, the Court will only focus on the provisions of Rule 16.

<sup>8</sup> *Id.* at 752 (internal citations omitted).

<sup>9</sup> *Id.* at 751-52.

<sup>10</sup> *Id.* at 752.

<sup>11</sup> *Hammond*, 569 A.2d at 88.

It is most consistent with the purposes of those safeguards to hold that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. . . . Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later.<sup>12</sup>

The material present on Defendant's hands was "gathered" by the Dover Police shortly after the shooting. However, due to improper swabbing of Defendant's hands, the material was not preserved for testing. Procedures exist for the proper gathering and testing of GSR material on a suspect's hands, and for the disclosure of such test results to defendants. Defendant voluntarily submitted to the GSR testing shortly after incident, and relied on the State to properly gather and preserve the evidence for use in his defense. Defendant was not under arrest at the time of the GSR testing, and presumably did not have a defense attorney to order independent GSR testing. Therefore, the Court finds that the State had a duty to preserve the material on Defendant's hands for GSR testing.

The final step in the *DeBerry* analysis requires another three-part analysis to determine whether the State breached its duty to preserve evidence, and the consequences of such a breach.<sup>13</sup> The Court will consider "(1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the

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<sup>12</sup> *DeBerry*, 457 A.2d at 751, quoting *United States v. Bryant*, 439 F.2d 642, 651 (D.C. Cir. 1971).

<sup>13</sup> *Id.* at 752.

sufficiency of the other evidence adduced at the trial to sustain the conviction.”<sup>14</sup>

Defendant does not contend that the Dover Police improperly administered the GSR test in bad faith. Defendant does, however, argue that the police were negligent. The Court agrees with Defendant that the police officer who administered the GSR test was negligent. Failing to swab Defendant’s hands with the applicator, as the State’s January 5, 2009 letter to Defendant’s counsel indicates, or failing to first moisten the applicator with nitric acid, as was alleged during oral argument, was a breach of the State’s duty to gather and preserve discoverable evidence.

Next, the Court will consider the importance of the missing evidence. The State argues that the results of GSR testing would not be conclusively inculpatory or exculpatory, and is therefore not very important.<sup>15</sup> The Court disagrees. Because Defendant is accused of firing a gun, the results of GSR testing on the material gathered from Defendant’s hands would be important to his defense. Defendant remained at the scene of the shooting and submitted to GSR testing shortly afterward. No evidence has been proffered by the State that Defendant had time to wash his hands between the time of the shooting and the GSR testing. The absence of GSR on Defendant’s hands, if a negative GSR test result was obtained, would have been very important evidence for the defense.

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<sup>14</sup> *Id.* (internal citations omitted). The Court will examine the sufficiency of other evidence the State could introduce at trial in considering part (3) of this step.

<sup>15</sup> A “conclusively exculpatory” standard in denying a defendant’s motion for dismissal or an instruction to the jury that the lost evidence, if available, would be exculpatory in nature, is inconsistent with the holding in *DeBerry. Hammond*, 569 A.2d at 90.

Finally, the Court examines the sufficiency of the other evidence available to the State. The police report supplied by the State indicates that multiple bystanders identified Defendant as having fired a gun in the area of the incident. The Court finds that this evidence is sufficient for the State to withstand Defendant's motion to dismiss, but the question remains concerning what consequences should flow from the State's failure to properly gather and preserve the material on Defendant's hands.

The State must bear responsibility for the loss of this evidence. Therefore, Defendant is entitled to the inference that the GSR test results, if available, would have been exculpatory.<sup>16</sup> The Court will give an appropriate instruction<sup>17</sup> permitting the jury to infer that the GSR test results, if available, would have been exculpatory.

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<sup>16</sup> *DeBerry*, 457 A.2d at 754.

<sup>17</sup> The following jury instruction was given by the trial judge in *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) when the semen sample evidence degraded due to lack of refrigeration and the defendant was charged with child molestation: "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." As a result, any uncertainty as to what the evidence might have proven is turned to the defendant's advantage.

*State v. Anthony D. Price*

**I.D. No. 0808009337**

February 4, 2009

### **CONCLUSION**

For the foregoing reasons, Defendant's Motion to Dismiss is *denied*. IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution